DEC 13 1993
OFFICE OF THE CLERK

No. 92-1968

# In The
# Supreme Court of the United States
## October Term, 1993

**TICOR TITLE INSURANCE COMPANY, *et al.*,**
***Petitioners,***

*v.*

**WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,**
***Respondents.***

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS

ARAM A. HARTUNIAN
ARAM A. HARTUNIAN & ASSOC., P.C.
122 S. Michigan, Ave. Suite 1850
Chicago, IL 60603
(312) 427-3600

GERALD D. W. NORTH*
1735 Market Street
36th Floor
Philadelphia, PA 19103
(215) 994-1170

RONALD L. FUTTERMAN
JAMES G. BRADTKE
FUTTERMAN & HOWARD, CHTD.
122 S. Michigan, Suite 1850
Chicago, IL 60603
(312) 427-3600

TED M. WARSHAFSKY
ROBERT GOLDSTEIN
WARSHAFSKY, ROTTER, TARNOFF, GESLER, REINHARDT & BLOCH
839 N. Jefferson Street
Milwaukee, WS 53202

KELLY REED
KELLY REED, P.C.
P.O. Box 9219
Scottsdale, AZ 85252-9219

*Attorneys for Respondents*
* Counsel of Record

Chicago Legal Copies, Inc. (312) 332-7777

BEST AVAILABLE COPY

No. 92-1988

# In The

# Supreme Court of the United States

## October Term, 1993

**TICOR TITLE INSURANCE COMPANY, *et al.*,**

*Petitioners,*

*v.*

**WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,**

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS

## STATEMENT OF THE CASE

The district court in this Rule 23(b)(3) federal antitrust class action for treble damages dismissed the damage claims of the class under the doctrine of *res judicata* based upon the settlement of an earlier federal antitrust class action in which essentially only injunctive relief was sought. Although the earlier class action was filed under Rule 23(b)(3), and originally sought treble damages, that case ultimately was certified under Rule 23(b)(1)(A) and 23(b)(2) alone as part of a settlement that was intended to preclude absent class members from opting out and separately pursuing their treble damage claims. The district court in the first case (MDL 633) found that "the shift from bringing [the] case as a Rule 23(b)(3) class action for treble damages to settling it as a Rule 23(b)(1) and (b)(2) class action

providing essentially only injunctive relief . . . was brought about by a concomitant shift from an action seeking treble damages to an action seeking primarily injunctive relief." (Pet. App. 56a) However, in its final order approving the settlement, that court purported to extinguish the unlitigated treble damage claims — claims that could not properly have been asserted in a Rule 23(b)(1)(A) and (b)(2) case. The Ninth Circuit held that it would be a violation of minimal due process if that settlement barred the damage claims of the class in this case.

1. *Background of the Litigation.* In 1985 the Federal Trade Commission began an action against the petitioners for price fixing fees for real estate title examination and search services. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Initial Decision of Administrative Law Judge (December 22, 1986). Twelve private class actions, filed in the wake of the FTC's complaint, were consolidated in the Eastern District of Pennsylvania as MDL 633. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 1986-1 Trade Cases (CCH) ¶67,149 (E.D. Pa. 1986). The consolidated cases sought tens of millions of dollars in damages on behalf of consumers who purchased title search and examination services at fixed prices in thirteen states. Shortly after consolidation of the private cases, this Court handed down its decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). *Id.* at 62,922.

The *Southern Motor Carriers* decision was construed by class counsel as being adverse to the class members' claims. *Id.* at 62,923. Class counsel failed to distinguish among the various state regulatory schemes in assessing the impact of the *Southern Motor Carriers* decision. *Id.* at 62,932. In early 1986, the MDL 633 class representatives entered into a settlement under which they abandoned the damage claims of the class. Certification was then sought under Rules 23(b)(1) and (b)(2). *Id.* at 62,928. Dropping the damage claims at the time of settlement was intended to avoid certification under Rule 23(b)(3) and thereby eliminate the right of objecting class members to opt-out. *Id.* at 62,929.



Attorneys General from several states, including Arizona and Wisconsin, objected to the settlement. *Id.* at 62,926-932. Among other things, it was argued that the effect of the *Southern Motor Carriers* decision varied from state to state. *Id.* at 62,927. In states where the title insurers' price fixing was not actively supervised, for example, *Southern Motor Carriers* had no impact whatsoever. *Id.* at 62,932.[1]

The MDL 633 court held that none of the class members could opt-out because the class had been certified under Rule 23(b)(1) and (b)(2), rather than Rule 23(b)(3). *Id.* It overruled all objections and approved the settlement. It acknowledged that the claims involved tens of millions of dollars of overcharges by the defendants (*Id.* at 62,935) but nevertheless entered a judgment purporting to extinguish these damage claims for all class members, including the absent Arizona and Wisconsin class members. *Id.*

The Arizona Attorney General appealed the refusal to allow absent class members to opt-out. The Third Circuit affirmed without opinion. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1988), *cert. denied*, 485 U.S. 909 (1988). In a subsequent decision by the Third Circuit in 1989 (vacating an injunction by the MDL 633 court against the Arizona Attorney General who was then seeking damages for the Arizona class members in the Arizona state courts), the Third Circuit observed that the absent Arizona class members in MDL 633 had not been provided with the minimum procedural protections required by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and explained its earlier affirmance without opinion of the MDL

---

[1] Liability of the defendants under the antitrust laws turned on whether they were entitled to state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943). The test for state action immunity has two prongs: (1) actions alleged to be violations of the antitrust laws must be taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) there must be active state regulation. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). This Court's *Southern Motor Carriers* decision only dealt with the first prong. Thus, in those states where there was insufficient regulation of the defendants, the *Southern Motor Carriers* decision was superfluous to the state action defense.

633 judgment as having been based on the assumption that the absent class members could always obtain collateral review. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 762-763, 764 n. 1 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

Six months after the Third Circuit's 1989 decision in *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, the FTC entered a final order finding that there had been no active state regulation of search and examination rates in either Arizona or Wisconsin and that the defendant title insurers were guilty of price fixing in those states. *In re Ticor Title Ins. Co.*, Docket No. 9190, p. 13-20, FTC Final Order (September 19, 1989). On review in this Court last term,the FTC's conclusion that the title insurers were *not* entitled to state action immunity in Wisconsin was affirmed and the question of petitioners' entitlement to state action immunity in Arizona was remanded for further consideration. *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2176 (1992). This Court's decision thus confirmed the correctness of the arguments advanced by the Attorneys General in MDL 633 that the effect of *Southern Motor Carriers* on the class' damage claims varied from state to state.

2. *The Proceedings Below*. This treble damage suit was filed on the heels of the FTC's Final Order. The district court granted defendants' motion for summary judgment on the ground that the MDL 633 judgment was *res judicata*. On appeal plaintiffs argued that either: (1) MDL 633 was a case properly certified under Rules 23(b)(1) and (b)(2) — in which case there could be no *res judicata* effect on plaintiffs' damage claims because those claims could not be raised in such a proceeding — or (2) plaintiffs had been denied due process because they had no opportunity to opt-out of MDL 633 before their substantial damage claims were surrendered. (Appellant's Reply Br. at 2-3) In addition, plaintiffs argued that they had been inadequately represented by the class representatives in MDL 633, none of whom were from Arizona or Wisconsin. The Ninth Circuit reversed the district court on the ground that plaintiffs' due process rights had been violated. It rejected plaintiffs' adequacy of representation arguments but never addressed the



fact that the class representatives' claims were not typical of those held by the absent Arizona and Wisconsin class members. It did not address plaintiffs' contention that *res judicata* simply did not apply.

On October 1, 1993, the parties reached a settlement in this case that provides for cash payments of over $2.8 million to the Arizona and Wisconsin class members. The express intention of the parties in settling this case was to moot the then-pending petition for certiorari, and the Court was so informed. On October 4, 1993, unaware of the settlement agreement, this Court granted certiorari. The Court denied a subsequent motion to defer briefing and argument pending final approval of the settlement in the district court. The parties have advised both this Court and the district court that they are taking the steps necesssary to effectuate the settlement, notwithstanding the granting of certiorari.

## SUMMARY OF ARGUMENT

If the MDL 633 court did not certify that case under Rule 23(b)(3) for the reason that the damage claims were dropped from the case, then there can be no preclusive effect regarding those claims. But if the damage claims were validly released as part of the settlement bargain, and hence were not dropped from the case, then the class members continued to be common question/ damage claimants and they remained entitled to their constitutional due process rights to notice and opt-out.

1. *Res judicata* was not available to the title insurers as a defense in this case. As a result of the "shift" in MDL 633 from a Rule 23(b)(3) case seeking treble damages to a Rule 23(b)(1)(A) and (b)(2) case for "essentially only injunctive relief," the damage claims were effectively dropped from the case. In MDL 633, as in any other antitrust case, the damage claims were sought under Section 4 of the Clayton Act, 15 U.S.C. §15, whereas injunctive relief was sought under Section 16 of the Clayton Act. 15 U.S.C. §26. Rule 23 does not permit (b)(1)/(b)(2) class actions in Section 4 Clayton Act cases, any more than in mass tort cases such as those referred to by petitioners at page 27 of their brief (acknowledging that such cases cannot

be certified under 23(b)(1)(A) or (b)(2) where notice and the right to opt-out are not provided). It is beyond dispute that damage claims may not be asserted in a Section 16 case. Accordingly, the unlitigated decree in MDL 633 could not preclude the class' damage claims. The Ninth Circuit's decision therefore can and should be affirmed without reaching the constitutional issue raised by petitioners.

2. If *res judicata* did bar the damage claims in this case, then plaintiffs' due process rights would be violated. "[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the Court." *Shutts*, 472 U.S. at 812. Petitioners' interpretation of *Shutts* as involving only an issue of the jurisdictional reach of state courts is incorrect. That interpretation is predicated on the false premise — claimed to be "the key to this case" — that "state courts can only assert jurisdiction over parties having minimum contacts with the state." Petitioners' Brief at 12. That premise was rejected in *Shutts*.

*Shutts* held that a state court *may* constitutionally exercise jurisdiction over absent class members who have *no* minimum contacts with the state. This aspect of *Shutts* was foreshadowed in both *Hansberry v. Lee*, 311 U.S. 32 (1940) and *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). The balance of the *Shutts* holding, like those in *Hansberry* and *Mullane*, implicates the procedural fairness aspect of due process. The portion of *Shutts* at issue here is its specification of the requirements of minimal due process in cases wholly or predominately for money damages. *Shutts* elucidates five procedural requirements in such cases, one of which is the right to opt-out. The minimal procedural due process requirements set out in *Shutts*, like those announced in *Mullane*, are equally applicable to federal courts. Because the absent Arizona and Wisconsin class members did not have an opportunity to opt-out of MDL 633, their due process rights would be violated if their damage claims were barred by *res judicata*. Moreover, clear differences between the claims of the absent Wisconsin and Arizona class members and those of the class representatives in MDL 633 establish a sufficient degree of antagonism to establish inadequate representation.



3. This case does not present an issue regarding the possible extension of *Shutts* to cases properly certified under Rules 23(b)(1) or (b)(2) whenever a monetary element is involved. The type of monetary recovery available under those subdivisions of Rule 23 is essentially equitable in nature; common law type damage claims are properly certifiable only under Rule 23(b)(3). Here, the monetary elements involved were the equivalent of common law damages claims, *Albrecht v. Herald Co.*, 452 F.2d 124, 127-28 (8th Cir. 1971), and as such were unavailable in an action certified under 23(b)(1)(A) and (b)(2). While it is not necessary, therefore, to decide whether the Due Process Clause of the Fifth Amendment requires a right to opt-out in 23(b)(1)(A) and (b)(2) cases that involve a monetary component, petitioners plainly are incorrect in suggesting that no principled basis exists for a constitutional distinction between claims for injunctive relief (including certain types of equitable recovery of monies) and common law type claims for money damages. First, equitable claims never occasion a right to trial by jury under the Seventh Amendment, even when recovery of money is involved, whereas common law damage claims almost always give rise to that right. Secondly, the Due Process Clause itself logically encompasses a distinction between damage and injunctive claims. Common question claims require different procedural protections than claims for injunctive or declaratory relief. The presumed identity of interests of representatives and absent class members in cases brought under 23(b) (2), for example, may provide a sufficient basis for relying on adequacy of representation as the sole due process protection accorded absent class members. But the heterogeneity of class members in a Rule 23(b) (3) class action and the individualized nature of their claims dictates a need to ensure greater control by individual class members over the outcome of the litigation and the disposition of their property rights. This case provides a classic example of the need for an opt-out right in cases involving claims for monetary damages.

## ARGUMENT

### I. THIS CASE DOES NOT PRESENT A CONSTITUTIONAL QUESTION

Petitioners' first two formulations of the question presented both attempted to raise issues of constitutional dimensions[2] while their third iteration poses a procedural issue which is not presented by the record in this case:

> This case presents the question whether unnamed plaintiff class members have a right to opt-out of a federal court class action certified under Rule 23 (b)(1) and (b)(2) of the Federal Rules of Civil Procedure whenever claims for monetary relief are involved.

(Pet. Br. at 2) Petitioners' three different statements of the issue are not fairly presented by the record in this case nor are they properly before this Court for decision.

The MDL 633 court decided what opt-out rights would be extended to members of the MDL 633 settlement class. *In re Real Estate Title Settlement Services Antitrust Litigation*, 1986-1 Trade Cases (CCH) ¶ 67,149 (E.D. Pa. 1986) (Pet. App. 31a), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987) (Pet. App. 78a), *cert. denied*, 485 U.S. 909 (1988) (Pet. App. 79a). Whether right or wrong, that decision has become final and is not before this Court for review or modification. What was before the lower courts in this case and what is before this Court for decision now is

---

[2] Certiorari was granted limited to Question No. 1 in the Petition for Writ of Certiorari which stated:

> Whether a federal court may refuse to enforce a prior federal class action judgment, properly certifiable under Rule 23 on grounds that absent class members have a constitutional due process right to opt-out of any class action which asserts monetary claims on their behalf.

Pet. Br. at (1). The Brief for Petitioners restated the question presented but sought to preserve the alleged constitutional issue:

> Whether a federal court may refuse to enforce the judgment in a nationwide class action certified under Rule 23(b)(1) and 23(b)(2) on the ground that unnamed class members have a constitutional right to opt out of any class action asserting monetary claims.

Pet. Br. at (i).



the question of the preclusive effect[3] of the settlement agreement in MDL 633 on absent members of the class.

Contrary to petitioners' formulation of the question presented, the Ninth Circuit did not "refuse to enforce the [MDL 633] judgment." (Pet. Br. at (i)) The Ninth Circuit gave full preclusive effect to the settlement of the injunctive claims but did not bar the damage claims which could not have been asserted in a class action certified under Rules 23(b)(1) and 23(b)(2). The Ninth Circuit stated:

> Brown will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or further injunctive relief in this case, but *res judicata* will not bar Brown's claims for monetary damages against Ticor.

982 F.2d at 392.

The Ninth Circuit's decision was in accordance with well-established interpretations and traditional applications of the preclusion doctrine and does not implicate any issues of constitutional dimension. Preclusion is limited to those matters which actually were raised or which could have been raised in the earlier

---

[3] Petitioners' repeated reference to "res judicata" is a malapropism when they actually intend to refer to the preclusion doctrine. "Res judicata" means literally "that which has been decided" and necessarily implies a *decision* by a court or a jury while preclusion is a more general term which embraces settlement agreements such as the one in MDL No. 633. *See generally* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4402 (1981).

"The basically contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties." 18 C. Wright., A. Miller and E. Cooper, § 4443 at 384 (1981) (collecting cases); *see also, e.g., United States v. International Building Co.*, 345 U.S. 502, 505-06 (1953) ("A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties."). *Ashley v. City of Jackson, Miss.*, 464 U.S. 900, 902 (1983) (consent decree is "little more than a contract between the parties, formalized by the signature of a judge" and "cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree." (Rehnquist, J., dissenting to denial of certiorari).

suit. *See generally* 18 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4412 (1981) (collecting cases). Before the merger of law and equity, for example, an adverse decision in an action at law would not bar a subsequent suit in equity because the equitable claims could not have been raised in the first suit. *E.g., Northern Assur. Co. v. Grand View Building Ass'n*, 203 U.S. 106 (1906); *Boyce's Executors v. Grundy*, 28 U.S. (3 Pet.) 210 (1830). Conversely, an earlier decision on injunctive claims (such as the settlement of the injunctive claims in MDL 633) would not bar a later suit for damages (such as those alleged by respondents here) because the damage claims could not have been asserted in the earlier suit in equity. *Ash Sheep Co. v. United States*, 252 U.S. 159, 170 (1920). In a wide variety of circumstances, the preclusive effect of earlier judgments is routinely limited where constraints of subject matter jurisdiction,[4] discretionary refusal

[4] Where the first court did not have jurisdiction over certain claims, a second suit alleging those claims is not precluded by the first action. *E.g., Mitchell v. Humana Hospital-Shoals*, 942 F.2d 1581, 1582 n.1 (11th Cir. 1991) (civil rights claim not barred by earlier unemployment compensation case in which civil rights claim could not have been raised); *North v. Walch*, 881 F.2d 1088, 1093-95 (D.C. Cir. 1989) (preclusion "applies only if the litigant . . . could have raised the issue in the earlier action"); *United States ex rel. Villa v. Fairman*, 810 F.2d 715, 718 (7th Cir. 1987) (habeas corpus action challenging length of sentence not barred by settlement of earlier civil rights action challenging conditions of confinement where length of sentence could not have been challenged); *Bottini v. Sadore Management Corp.*, 764 F.2d 116, 121-22 (2d Cir. 1985) (earlier ejectment action in city court with limited jurisdiction does not bar subsequent civil rights claim).



to exercise pendent jurisdiction,[5] procedural, [6] temporal[7] or other limitations[8] prevented a matter from being raised in the first suit.

In accord with these principles, it is also well-established that a class action seeking only injunctive or declaratory relief does not preclude a subsequent suit for damages. *Norris v. Slothouber*, 718 F.2d 1116, 1117 (D.C. Cir. 1982); *Herron v. Beck*, 693 F.2d 125, 127 (11th Cir. 1982); *Jones-Bey v. Caro*, 535 F.2d 1360, 1362 (2d Cir. 1976). In *Jones-Bey*, for example, a prison inmate was not precluded from pursuing damage claims relating to unconstitutional prison conditions that were the predicate for a consent judgment affording declaratory and injunctive relief in a prior class case. *Jones-Bey*, 535 F.2d at 1361-1362. As in the present case, the earlier settlement judgment in *Jones-Bey* did not preclude later damage claims because it could not address

[5] *E.g., Merry v. Coast Community College District*, 97 Cal. App. 3d 214, 158 Cal. Rptr. 603 (1979); *Pottern v. Bache Halsey Staurt, Inc.*, 41 Colo. App. 451, 589 P.2d 1378 (1978); *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241 (1977), *cert. denied* 440 U.S. 936 (1979); *Puckett v. City of Emmett*, 113 Idaho 639, 747 P.2d 48, 53 (1987); *Cranwill v. Donahue*, 99 Ill. App. 3d 968, 426 N.E.2d 337 (1981); *Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc.*, 46 Or. App. 199, 611 P.2d 658 (1980).

[6] *E.g., Stark v. Starr*, 94 U.S. 477, 485-86 (1877) ("Having required the complainants to proceed in that suit only upon one cause or ground for relief, the court left the other cause open for any future suit which they might choose to bring.")

[7] Where two suits involve different periods of time, a decision covering one time period does not preclude claims during another time period. *E.g., Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322 (1955) (no preclusive effect where second suit involved different time period than first suit which was settled); *Walsh v. Butcher & Sherrerd*, 452 F. Supp. 80 (E.D. Pa. 1978) (no preclusive effect where record showed that second claim had not been released in settlement of first suit).

In MDL 633, the claims settled covered only "the period from January 1, 1981 to December 31, 1985 inclusive" (1980-1 CCH Trade Cas., at 62,924) while the claims alleged in the present case are for the "period from January 7, 1981 to the present time" or April 13, 1990. (Joint App. at 5)

[8] Failure to prove a claim based on a higher burden of proof does not bar a subsequent claim requiring a lesser burden of proof. *E.g., One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235 (1972).

such claims. *Id.*

Petitioners admit that damage claims may not be asserted in mandatory class actions certified only under Rules 23(b)(1) and 23(b)(2).[9] Treble damage claims under section 4 of the Clayton Act, 15 U.S.C. § 15, cannot be asserted in a class action which has been certified only under Rules 23(b)(1) and 23(b)(2). *E.g.*, In re *Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 342 (E.D. Pa. 1976); *See generally* 7B C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* § 1781 (1986). The court in MDL 633 specifically ruled that absent members of the settlement class were unable to opt-out to assert their own individual damage claims (1986-1 CCH Trade Cas. at 62,929-30), which unequivocally establishes that the individual damage claims could not have been asserted as part of the class in MDL 633. Moreover, the settlement approved in MDL 633 afforded the class only relief of an injunctive nature.

The Ninth Circuit's decision therefore involved nothing more than the application of well-established principles of preclusion. This decision does not present any constitutional issues or require this Court to decide the propriety of the MDL 633 Court's decision regarding the administration of the class action before it. Since this Court does not ordinarily reach out to decide unnecessary constitutional issues that are not properly presented by the record, the writ of certiorari should be dismissed as improvidently granted. *E.g., Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972); *McClanahan v. Morauer & Hartzell*, 404 U.S. 16 (1971); *Bostic v. United States*, 402 U.S. 547 (1971); *Jones v. State Board of Education*, 397 U.S. 31 (1970); *Palmieri v. Florida*, 393 U.S. 218 (1968); *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968); *Johnson v. Massachusetts*, 390 U.S. 511 (1968); *Smith v. Mississippi*, 373 U.S. 238 (1963); *Needelman v. United States*, 362 U.S. 600 (1960); *McCarthy v. Bruner* , 323 U.S. 673 (1944); *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917).

[9] "It is common knowledge that [Rule 23 currently does not permit mandatory class actions in] mass tort cases in areas like asbestos. . . . " Pet. Br. at 27.



## II. THE CERTIFIED QUESTION WAS DECIDED IN PHILLIPS PETROLUEM CO. V. SHUTTS

Petitioners contend that "the key to this case. . . [is that] state courts can only assert jurisdiction over parties having minimum contacts with the state" whereas "the Constitution allows federal courts to exercise adjudicatory power at least with respect to all persons and property located in the United States." (Pet. Br. 12) But *Shutts* holds that state courts *may* exercise jurisdiction over absent class members who have no minimum contacts with the forum state.[10] The *Shutts* opt-out holding cannot therefore turn on a question of jurisdictional power under the Fourteenth Amendment.

That *Shutts* involved considerations of procedural fairness, rather than territorial jurisdiction, is apparent on the face of the opinion. It is clear from the Court's comment that if an opt-in requirement (advocated by petitioners there) were required by due process, that would entail "invalidation of the class action provision of the Federal Rules of Civil Procedure". 472 U.S. at 813 (emphasis added). That would hardly be the case if the opt-in/opt-out debate in *Shutts* involved only an issue of the territorial scope of a state court's jurisdiction. It is also noteworthy that the opt-out requirement appears in a list of procedural protections commonly required of federal as well as state courts.

This case, like *Shutts*, involves the second aspect of due process, namely, the requirements of procedural fairness. *Shutts*, after holding that a state has jurisdictional power over claims of absent class action plaintiffs without minimum contacts, held that "minimal procedural due process protection" must be accorded such parties. The components of minimal procedural due process are:

1. Notice with an opportunity to be heard and participate in the litigation.

[10] In reaching this conclusion in *Shutts*, the Court adopted an argument advanced there by counsel now representing petitioners in the present case, that "the 'minimum contracts requirement'. . . is an inappropriate constitutional standard for testing the assertion of jurisdiction over nonresident class action plaintiffs." (Brief for Respondents in *Shutts*, pp. 5-6)

2. Notice of the best practicable sort.
3. Notice that describes the action and the plaintiff's rights in it.
4. At a minimum, an opportunity for class members to remove themselves from the class by executing an opt-out or request for exclusion form.
5. Adequate representation by the named plaintiff.

The substantive content of minimal procedural due process owed by a state court to absent class members is coterminous with the minimal due process protection that must be accorded such parties by a federal district court. The due process guarantees of the 5th and 14th Amendments are essentially the same. *See, In re Real Est. Title and Settlement Services Antitrust Lit.*, 869 F.2d 760, 766 n. 6 (3d Cir. 1989); *Pan Am. World Airways, Inc. v. U.S. Dist. Court*, 523 F.2d 1073, 1077 (9th Cir. 1975).[11]

This case falls squarely within the holding of *Shutts*. The title insurers' attempt to whittle down to one the list of five procedural protections enumerated in *Shutts*, in arguing that the constitutional legitimacy of all class actions "turns on an assurance that the named plaintiffs have adequately represented the interests of unnamed class members," (Pet. Br. 18), is a narrow and erroneous conception of due process. It cannot be squared with *Shutts* or the common understanding that minimal procedural due process is owed by all courts, whether federal or state.

## III. DUE PROCESS EMBRACES A DISTINCTION BETWEEN CLAIMS FOR MONEY DAMAGES AND CLAIMS FOR INJUNCTIVE RELIEF

The balance of petitioners' argument amounts to an attack on the *Shutts* limitation to cases wholly or predominately for money damages. That attack need not be considered here because this case does not present a situation in which primarily injunctive relief was sought along with incidental claims for monetary relief of an equitable or restitutional nature. Here, the

[11] This principle is reflected in the Advisory Committee Notes to Rule 23, which cites *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a case originating in state court, in observing that the Rule's notice provisions are designed to meet due process.



case as certified sought primarily injunctive relief, yet the unlitigated judgment is asserted as a bar against common law type damage claims that could not have been asserted in the earlier proceeding. Accordingly, this is not an appropriate case in which to consider whether all claims for monetary relief, including those claims that may properly be pursued in a mandatory class action, occasion a right to opt-out.

Nevertheless, petitioners' fundamental contention — that there is no principled basis for distinguishing between claims for money damages and claims for injunctive relief under the Due Process Clause — is clearly wrong. The argument ignores the Seventh Amendment, which accords a Constitutional jury trial right with respect to claims for money damages but no such right with respect to claims for injunctive relief. *See Beacon Theatre, Inc. v. Westover*, 359 U.S. 500 (1959). Here, the claims for monetary damages were equivalent to common law claims. *See Albrecht v. Herald Co.*, 452 F.2d 124, 127-28 (8th Cir. 1971). Eliminating the right to opt-out in a case involving money damages necessarily impacts on that separate Seventh Amendment right, whereas the inability to opt-out of a class seeking equitable relief entails no similar deprivation.[12]

Petitioners' argument also ignores fundamental considerations relevant to the very due process contentions they advance. Those fundamental concerns involve the differing nature of claims normally brought in a (b) (3) case from those that are typical of (b) (1) and (b) (2) litigation, and the greater potential for abuse in a (b) (3) case. In a classic (b) (1) (A) or (b) (2) case, the claims of the class are inherently cohesive: "the very nature of a (b) (2) class is that it is homogeneous without any conflicting interests between the members of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 256 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975). A (b) (2) case envisions a class defined by "the homogeneity and cohesion of its members' grievances, rights and interests." G. Rosen, *Title VII Classes and Due Process: To (b) (2) Or Not To (b) (3)*, 26 Wayne L.Rev. 919, 923 (1980). The relief afforded in a (b) (2) case also applies to the class as

[12] Notably, the right to a jury trial applies to even modest claims for money damages but is not available in cases seeking injunctive relief, even if vastly more important matters are involved.

a whole. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983). Similarly, it has been held that a (b) (1) (A) class is appropriate when "there is a total absence of individual issues." *Tober v. Charnita, Inc.*, 58 F.R.D. 74, 81 (M.D. Pa. 1973).

In contrast, (b) (3) class actions seeking monetary relief do not usually involve a similar degree of homogeneity. Claims of the class representative are far less likely to be typical of the claims of the class as a whole. *Holmes*, 706 F.2d at 1156. While common questions must predominate over individual questions for the class to be certified, substantial rights may hinge on the resolution of questions that affect only some members of the class. *Id.* at 1157.

It is this heterogeneity, inherent in cases involving common law claims for damages, that led the framers of Rule 23 to provide additional protections for absent members of classes involving such claims. Thus in *Holmes*, the Eleventh Circuit observed that:

> [t]he procedural protections accorded to absent class members differ depending on whether the class is certified under (b) (2) or (b) (3). Unlike members of (b) (3) classes, class members of actions certified under (b) (2) ordinarily are not entitled to individual notice and typically do not have the right to opt-out of the lawsuit. These differing levels of protection reflect the assumptions of cohesiveness underlying the two types of classes.

*Holmes*, 706 F.2d at 1156-57.

The different procedural protection afforded class members in cases seeking monetary damages also reflects the efficacy of a right to opt-out in such cases as compared to cases seeking equitable relief:

> Opting out of a (b) (2) suit for injunctive relief would have little practical value or effect. Even class members who opted out could not avoid the effects of the judgment. A (b) (2) injunction would enjoin all illegal action, and all class members would necessarily be affected by such broad relief.



*Id.* at 1157.

Because claims for monetary damages present a greater need for protection and because a right to opt-out has greater value in such cases, some courts have held that due process requires the safeguards mandated in a (b) (3) case with respect to the monetary aspects of actions certified under (b) (2), even where the monetary relief sought is equitable in nature. Thus, in *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir 1979), the court held that due process required individual notice before the pecuniary claims of absent (b) (2) class members could be barred, reasoning that when "only equitable relief is sought. . . the due process interests of absent members will usually be safeguarded by adequate representation alone" but that where "individual monetary claims are at stake, the balance swings in favor of the provision of some form of notice." *Id.* at 437-38.

Similarly, in *Holmes*, the Eleventh Circuit held that notice and a right to opt-out should be provided to members of a (b) (2) class with monetary claims for back pay:

> Because "the fundamental justification for not requiring notice to absent class members, nor providing the opportunity to be heard or to exclude themselves from the class, is that the class' cohesive characteristics — its identity of rights and interests — bind the class together so that identical (or at least similar) relief is appropriate, " and because that justification is not present under the facts of this case, we hold that the right to opt-out of the class, normally accorded only to (b) (3) class members, must be extended to all members of this (b) (2) class.

*Holmes*, 706 F.2d at 1160. (Citations omitted)[13]

---

[13] In *Holmes*, the court grounded its decision on Rule 23 rather than the mandates of the Due Process Clause. 706 F.2d at 1160. This approach is consistent with the approach followed by this Court in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177 (1974) and *Omni Capital Intern. v. Rudolf Wolff & Co. Ltd.*, 484 U.S. 97, 102 n. 5 (1987), in the which the Court interpreted the Federal Rules of Civil Procedure so as to avoid the need to reach constitutional issues.

In light of these and similar decisions, petitioners' contentions about the willingness of lower federal courts to ignore the distinctions between monetary claims and claims for injunctive relief, and adjudicate "hybrid" cases involving both types of claims without affording class members notice and an opportunity to opt-out with regard to their monetary claims, are grossly overstated. Some courts have treated "mixed" actions exclusively under the more exacting standards of (b) (3). 3B *Moore's Federal Practice*, ¶23.40 [4] at 281. Other courts have addressed mixed actions by eliminating the monetary relief aspect of the case and treating the remainder of the case under (b) (2). 3B *Moore's Federal Practice*, ¶23.40[4] at 23-281. *See Rice v. City of Philadelphia*, 66 F.R.D. 17, 21 (E.D. Pa. 1974). Yet other courts have recognized that, at the monetary relief stage of such an action, class members should receive notice and the opportunity to opt-out. 3B *Moore's Federal Practice*, ¶23.40 [4] at 23-282; *see Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983).

The factors that these courts have taken into account reflect the considerations identified by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and confirm that *Shutts* was correctly decided. The three factors to be considered are: (1) the interest of the party asserting the due process claim; (2) the risk of erroneous deprivation and the probable value of additional or alternative safeguards; and (3) the interests of other parties, including the interest of the government in providing or not providing the procedure. *Connecticut v. Doehr*, 111 S.Ct. 2105, 2112 (1991).

With respect to the first factor, every class member with a claim for damages has two substantial interests: (1) the class member's property interest in the cause of action: and (2) the class member's interest in controlling litigation affecting his rights. The substantial nature of these interests is indisputable: in *Shutts*, the Court expressly reaffirmed that "a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs [in the class]." 472 U.S. at 807, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Moreover, the weight these interests carry is increased because under principles of claim preclusion deprivation of a class member's property through a judgment or settlement is final.



The second *Mathews* factor similarly weighs in favor of affording absent class members opt-out rights. In the absence of notice and a right to opt-out, there are no safeguards that protect a class member's right to control litigation because a class member has no control over his individual claim. Reliance on a class representative's "adequacy" is not a substitute for the opportunity to pursue one's own claim. *See* M. Weber, *Preclusion and Procedural Due Process in Rule 23 (b) (2) Class Actions*. 21 U.Mich.J.L.Ref. 347, 366 (1988). If petitioners' position were correct, then the mandatory class action would become a device to supplant individual rights of action in innumerable contexts. A class action certified under Rule 23(b)(1) or (b)(2) would bar pending individual actions in mass tort cases, even where more favorable adjudications were reasonably expected in the individual actions. (The potential treatment of such claims under Rule 23(b)(1)(B) presents completely different issues). It is not difficult to envision situations in which mandatory class actions would supplant individual actions in circumstances occasioning significant monetary losses to individual claimants. Indeed, that is precisely what happened here. This Court's holding in *F.T.C. v. Ticor Insurance Co.*, 112 S.Ct. 2169 (1992) and the decision of the Ninth Circuit in the present case establish that the Arizona and Wisconsin class members were not subject to the state action defense as were the other members of the class. The proposed settlement in this case, involving over 2.8 million dollars cash consideration, amply reflects the damage claims that would have been surrendered if these class members were required to rely exclusively on the "adequacy" of the class representatives in MDL 633.[14]

The final factor in the balancing test (the interests of other parties and the government) also weighs in favor of affording opt-out rights in cases involving damages claims. Affording class members minimal due process in the form of notice and opt-out rights does not lead to judicial inefficiencies or undermine the class action device. The proof of this lies in the history of

---

[14] Even "adequate" representatives trade away or compromise the rights of portions of the class in pursuit of results on a broader scale. And a court reviewing the fairness of a settlement does not consider the merits of each individual's claim but addresses the fairness of the overall settlement. *See* Weber, 21 U.Mich.J.L.Ref. at 365-66.

Rule 23(b)(3) class actions. Requiring notice and opt-out rights has neither rendered these cases unmanageable nor deterred plaintiffs with meritorious claims from proceeding under this section. The societal cost of providing these procedural rights is minimal compared to the dangers to the judicial process of eliminating them.

In short, petitioners' analysis of the due process implications of the right to opt-out in cases involving monetary damages is shorn of the historical context and purposes of Rule 23 and ignores the efficacy of the opt-out right when claims for money damages are involved. The importance of the opt-out right in cases involving claims for monetary damages is starkly apparent here where the existence of that right was necessary to allow the absent Arizona and Wisconsin class members to pursue viable monetary claims unavailable to other members of the class.



## CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ARAM A. HARTUNIAN
ARAM A. HARTUNIAN & ASSOC., P.C.
122 S. Michigan, Ave. Suite 1850
Chicago, IL 60603
(312) 427-3600

RONALD L. FUTTERMAN
JAMES G. BRADTKE
FUTTERMAN & HOWARD, CHTD.
122 S. Michigan, Suite 1850
Chicago, IL 60603
(312) 427-3600

KELLY REED
KELLY REED, P.C.
P.O. Box 9219
Scottsdale, AZ 85252-9219

GERALD D. W. NORTH*
1735 Market Street
36th Floor
Philadephia, PA 19103
(215) 994-1170

TED M. WARSHAFSKY
ROBERT GOLDSTEIN
WARSHAFSKY, ROTTER, TARNOFF,
GESLER, REINHARDT & BLOCH
839 N. Jefferson Street
Milwaukee, WS 53202

*Attorneys for Respondents*

* Counsel of Record